UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

McDONALD'S USA, LLC, A JOINT EMPLOYER, et al.	
	Cases 02-CA-093893, et al.
and	**04-CA-125567, et al.**
	13-CA-106490, et al.
FAST FOOD WORKERS COMMITTEE AND	**20-CA-132103, et al.**
SERVICE EMPLOYEES INTERNATIONAL	**25-CA-114819, et al.**
UNION, CTW, CLC, et al.	**31-CA-127447, et al.**

CALIFORNIA RESPONDENTS' BRIEF IN SUPPORT OF SPECIAL APPEAL FROM THE ADMINISTRATIVE LAW JUDGE'S ORDER DENYING MOTION TO APPROVE SETTLEMENT AGREEMENTS

Dated: August 28, 2019

BEST BEST & KRIEGER LLP

/s/ Roger K. Crawford

Roger K. Crawford, Esq.
2855 E. Guasti Road, Suite 400
Ontario, CA
(909)466-4918

TABLE OF CONTENTS

Page

A. Background and Alleged Violations.

B. Proposed Remedies.

C. The Board Should Approve the Settlement Agreements.

Respondents MaZT, Inc., Sanders-Clark & Co., Inc., D. Bailey Management Co., and 2Mangas, Inc. (collectively "California Respondents") support approval of the settlement agreements they each entered into and, accordingly, McDonald's USA's and General Counsel's Special Appeals of Administrative Law Judge's order denying her approval of those settlement agreements. California Respondents join in the arguments that McDonald's USA and General Counsel made in their respective special appeals. California Respondents also write separately to emphasize their predicaments and how the Administrative Law Judge's rejection of the settlement agreements especially harms them while, at the same time, denies the alleged discriminatees and impacted employees full relief under the Act.

A. Background and Alleged Violations.

General Counsel issued its complaints against each of the California Respondents in December 2014. And a subsequent complaint containing new allegations was issued against Sanders-Clark & Co. less than two months later, in February 2015. Shortly after the complaints were issued, they were consolidated into a single matter, along with other complaints issued against respondents in New York, Pennsylvania, Illinois, and Indiana, and they were then transferred by General Counsel from their respective regions to the Regional Director of Region 2.

All respondents then filed motions to sever with the Administrative Law Judge Lauren Esposito. MaZT, Inc, for example, objected to the consolidation because it would require them, as a California employer, to defend the complaint in New York City along with multiple other co-respondents. In the California Respondents' view, the consolidation created an unmanageable

and unwieldy mess that would significantly increase the costs of all parties as well as unreasonably delay a speedy resolution to the case.

The Administrative Law Judge denied all the motions to sever, naively thinking that respondents' concerns could be easily ameliorated. However, in October 2016, after 58 days of trial, the Administrative Law Judge finally recognized her error and ordered that the California Respondents, as well as respondents in Chicago and Indianapolis, be severed from the proceeding in New York City, leaving only respondents in New York and Philadelphia (Regions 2 and 4) as part of the case in chief. Nevertheless, the Administrative Law Judge retained jurisdiction over the California Respondents' proceedings until a new judge could be appointed. Further, despite the severance, General Counsel reserved the right to introduce testimony from the Region 2 and 4 cases in the California Respondents' proceedings once they resumed.

Further, as severed parties, the California Respondents cases are being "held in abeyance pending a decision and order of the National Labor Relations Board" in the non-severed cases. (Order Severing Cases and Approving Stipulation, paragraph 5 of Stipulation.)

The unfair labor practices alleged against the California Respondents, all of which purportedly occurred in 2014, are as follows:

1. MaZT, Inc.

- An 8(a)(3) allegation that the employer terminated an employee because of her union activities.
- 8(a)(1) allegations that the employer interrogated employees about their union support, prohibited them from talking about the union during working time while allowing them to talk about non-union subjects, implicitly promised better wages and benefits to discourage union support, and prohibited off-duty employees from

accessing the customer areas and the parking lot while permitting customers to access those same areas.

` 2. Sanders-Clark & Co., Inc.

- 8(a)(3) allegations that the employer reduced certain employee's hours of employment and disciplined other employees in retaliation for their protected activities.
- 8(a)(1) allegations that the employer interrogated employees about their union activities, proposed the restoration of a prior work schedule if employees abandoned their union support, threatened an employee with unspecified discipline, and told employees that they were not allowed to talk about the union on company property.

3. D. Bailey Management Company.

- An 8(a)(3) allegation that the employer disciplined an employee by terminating his workday three hours early on one day, in retaliation for protected activity.
- 8(a)(1) allegations that the employer told an employee that he or she was not allowed to discuss discipline with co-workers and that employer maintained certain unlawful rules.

4. 2Mangas, Inc.

- 8(a)(1) allegations that the employer interrogated employee about their union activities and created the impression that they were under surveillance.

But for the joint employer allegations contained in the consolidated complaint, all the above allegations are of the type that would have likely settled quickly, and most likely, before any complaint was ever drafted and issued. Unfortunately, up until the California Respondents

entered into the proposed settlement agreements as issue in this Special Appeal, they were never even provided the opportunity to discuss how to resolve the allegations without proceeding to trial. They were instead forced to participate in an expensive, disruptive, time-consuming, and chaotic debacle with no way out.

And since a new judge had not been appointed by the time the California Respondents entered into their respective settlement agreements with General Counsel, Judge Esposito ruled on the motions to approve those settlements.

B. Proposed Remedies.

The proposed settlement agreements offer a full remedy for all of the alleged unfair labor practices.

With regard to the 8(a)(3) allegations, the settlements provide for full back pay, the payment of any excess tax attributable to a lump sum payment, and interest[1]. In addition, any adverse information in an employee's personnel file resulting from the alleged unlawful discipline would be removed with notice to the employee of that fact.

With regard to any unlawful policy, California Respondents agreed to rescind the policies in question, and with regard to the other 8(a)(1) allegations, they agreed to refrain from engaging in such conduct in the future. The California Respondents each also agreed to post an approved notice in English as well as any other language that General Counsel deemed appropriate for at least 60 consecutive days. They also agreed to mail that notice to the last known address of former employees who were employed during the relevant time period when the violations were alleged to have occurred.

[1] The employee terminated by MaZT negotiated through General Counsel an additional payment of front-pay in return for a waiver of reinstatement, which she signed.

The above remedies are the same that would be imposed if the California Respondents were forced to continue with the hearing and lost on all issues, once a new administrative law judge was appointed to preside over them and after the Board issued a decision and order on the non-severed cases. The only significant difference is that the settlement agreements would afford the alleged discriminates and other employees relief now, as opposed to forcing them to wait several more years. Given that the proposed settlement agreements were the first opportunity the California Respondents had to even participate in any discussions about a potential settlement of the unfair practice allegations against them, and given that the proposed agreements afford the alleged discriminates and impacted employees a full remedy, the California Respondents are at a loss as to what more they could do to settle the allegations.

C. The Board Should Approve the Settlement Agreements.

As parties who were severed from the instant matter pursuant to the October 12, 2016 Order Severing Cases and Approving Stipulation, the complaints against them have been held in abeyance and will continue to be so held pending a decision and order of the Board in the non-severed cases of Regions 2 and 4. This means that, once the Board issues its decision and order, the hearing will then proceed in California, either in Los Angeles[2] or Sacramento[3] or both[4], where further and extensive testimony will be heard on the underlying unfair labor practices as well as joint employer evidence that is individualized to each California Respondent. In this regard, the Administrative Law Judge is simply wrong in her claim that there are "literally days before the close of the monumental record," especially as that statement applies to the California

[2] Sanders-Clark & Co., Inc., D. Bailey Management Company, and 2Mangas, Inc. are located in Los Angeles.
[3] MaZT, Inc. is located in Sacramento.
[4] The Order Severing Cases and Approving Stipulation did not clarify whether the California Respondents would be severed from each other, an issue that will still have to be resolved.

Franchisees. (*See* ALJ Order Denying Motions to Approve Settlement Agreements, p. 38.) And while the Administrative Law Judge seems to place great weight on the resources already expended in this matter as a factor in denying approval of the settlement agreements, she ignores the significant resources that will have to be expended to continue this litigation through a Board decision and, subsequently, in further proceedings in California.

Indeed, the California Respondents anticipate that it may take several years before the Board can rule on the Region 2 and 4 cases, which likely means at least one more year before there can be an administrative law judge decision on any of the unfair labor practice allegations against the California Respondents. In the meantime, memories will fade further and essential witnesses on all sides may no longer be available. Indeed, it is not known now whether all essential witnesses are still available. What is known is that the California Respondents will be forced to endure continued headaches, legal expenses, and disruptions if the settlement agreement are not approved, and the alleged discriminates and impacted employees, many of whom will have long since moved on from employment at a McDonald's-brand restaurant, will be forced to wait years for a remedy. The longer the remedy is delayed, the less likely it will be that an employee who was impacted by an alleged unfair labor practice will still be employed with one of the California Respondents. Rather, it will be largely new employees reading a notice about alleged conduct that they never knew had even occurred. Such a notice will make no sense and have little meaning to those new employees.

Further, the Administrative Law Judge is also wrong about her claim that, "while approval of the settlement agreement would result in immediate relief for the alleged discriminates, the remainder of the proposed settlement is paltry and ineffective given the scope of the allegations." (ALJ Order Denying Motions to Approve Settlement Agreements, p. 39.)

The remedies for those 8(a)(1) allegations are exactly the same remedies that would be imposed in any case, but for the joint employer allegations. Allegedly unlawful policies would be rescinded or changed, and employees would be notified of that fact. And the employees would receive further assurances that their employers would honor their rights under Section 7 of the Act.

In short, the California Respondents believe that the reasons previously articulated by both McDonald's USA and General Counsel are sufficient to justify approval of the settlement agreements. And as noted above, the California Respondents have additional reasons for why those agreements need to be approved.

Dated: August 28, 2018

Respectfully submitted,

/s/ Roger K. Crawford
Roger K. Crawford
BEST BEST & KRIEGER LLP

CERTIFICATE OF SERVICE

The undersigned, an attorney for the California Respondents, hereby certifies that he caused a true and correct copy of ***California Respondents' Brief in Support of Special Appeal from the Administrative Law Judge's Order Denying Motion to Approve Settlement Agreements*** to be electronically filed with the NLRB Office of the Executive Secretary on August 28, 2018 and served on the same date via electronic mail at the following addresses:

Willis J. Goldsmith, Esq. Justin D. Martin, Esq. Ilana R. Yoffe, Esq. Jones Day 250 Vesey Street New York, NY 10281-1047 wgoldsmith@jonesday.com jmartin@jonesday.com iyoffe@jonesday.com	Barry M. Bennett, Esq. George A. Luscombe, III, Esq. Dowd, Bloch, Bennett & Cervone 8 S. Michigan Avenue, 19th Floor Chicago, IL 60603-3315 bbennett@dbb-law.com gluscombe@dbb-law.com
Robert Brody, Esq. Kate Bogard, Esq. Lindsay Rinehart, Esq. Brody and Associates, LLC 179 Post Road West Westport, CT 06880-4602 rbrody@brodyandassociates.com kbogard@brodyandassociates.com lrinehart@brodyandassociates.com	Gwynne Wilcox, Esq. Micah Wissinger, Esq. David Slutsky, Esq. Levy Ratner, P.C. 80 Eighth Avenue, Eighth Floor New York, NY 10011-7175 gwilcox@levyratner.com mwissinger@levyratner.com dslutsky@levyratner.com
Michael S. Ferrell, Esq. Jonathan M. Linas, Esq. E. Michael Rossman, Esq. Jones Day 77 W. Wacker Drive, Suite 3500 Chicago, IL 60601-1692 jlinas@jonesday.com mferrell@jonesday.com emrossman@jonesday.com	Claude Schoenberg, Esq. Schoenberg Law Office Two Bala Plaza, Suite 300 Bala Cynwyd, PA 19004 claude.schoenberg@me.com
Steve A. Miller, Esq. James M. Hux, Jr., Esq. Fisher & Phillips LLP 10 S. Wacker Drive, Suite 3450 Chicago, IL 60606-7592 smiller@laborlawyers.com jhux@laborlawyers.com	Mary Joyce Carlson, Esq. 1100 New York Avenue, NW Suite 500 West Washington, DC 20005 carlsonmjj@yahoo.com

Jonathan Cohen, Esq. Eli Naduris-Weissman, Esq. Rothner, Segall & Greenstone 510 S. Marengo Avenue Pasadena, CA 91101-3115 jcohen@rsglabor.com enaduris-weissman@rsglabor.com	Jeffrey A. Macey, Esq. Robert A. Hicks, Esq. Macey, Swanson and Allman 445 N. Pennsylvania Street, Suite 401 Indianapolis, IN 46204-1893 jmacey@maceylaw.com rhicks@maceylaw.com
Sean D. Graham, Esq. Weinberg Roger & Rosenfeld 800 Wilshire Boulevard, Suite 1320 Los Angeles, CA 90017-2623 sgraham@unioncounsel.net	Thomas O'Connell, Esq. Ashley Ratliff, Esq. Jacqueline Yaeger, Esq. Best, Best & Krieger LLP 3390 University Avenue, 5th Floor Riverside, CA 92501 thomas.oconnell@bbklaw.com jacqueline.yaeger@bbklaw.com ashley.ratliff@bbklaw.com
Louis P. DiLorenzo, Esq. Tyler T. Hendry, Esq. Patrick V. Melfi, Esq. Bond, Schoeneck & King, PLLC 600 Third Avenue New York, New York 10016 ldilorenzo@bsk.com thendry@bsk.com pmelfi@bsk.com	Nicole Berner, Esq. 1130 Connecticut Avenue, N.W., Suite 950 Washington, DC 20036-3975 nicole.berner@seiu.org
Michael J. Healey, Esq. Healey & Hornack, P.C. 247 Fort Pitt Boulevard, 4th Floor Pittsburgh, PA 15222 mike@unionlawyers.net	Joseph A. Hirsch, Esq. Hirsch & Hirsch One Belmont Avenue 8th Floor, Suite 8001 Bala Cynwyd, PA 19004 jahirsch@hirschfirm.com
David P. Dean, Esq. Kathy L. Krieger, Esq. James & Hoffman, PC 1130 Connecticut Ave, NW, Suite 950 Washington, DC 20036 dpdean@jamhoff.com klkrieger@jamhoff.com	Deena Kobell, Esq. National Labor Relations Board, Region 04 615 Chestnut Street, 7th floor Philadelphia, PA 19106-4404 deena.kobell@nlrb.gov

Edward Castillo, Esq. Christina Hill, Esq. Elizabeth Cortez, Esq. Sylvia Taylor, Esq. National Labor Relations Board, Region 13 209 South La Salle Street, Suite 900 Chicago, IL 60604-1443 edward.castillo@nlrb.gov christina.hill@nlrb.gov elizabeth.cortez@nlrb.gov sylvia.taylor@nlrb.gov	Richard McPalmer, Esq. National Labor Relations Board, Region 20 901 Market Street, Suite 400 San Francisco, CA 94103 richard.mcpalmer@nlrb.gov
Brian Gee, Esq. John Rubin, Esq. Rudy Fong-Sandoval, Esq. National Labor Relations Board, Region 31 11500 W. Olympic Boulevard, Suite 600 Los Angeles, CA 90064 brian.gee@nlrb.gov john.rubin@nlrb.gov rudy.fong-sandoval@nlrb.gov	Christopher Cullen National Labor Relations Board Division of Legal Counsel 1015 Half Street, SE Washington DC 20570 christopher.cullen@nlrb.gov
Geoffrey Dunham Jacob Frisch Zachary Herlands Nicole Lancia Alex Ortiz Nicholas Rowe Jamie Rucker National Labor Relations Board, Region 226 Federal Plaza, Room 3614 New York, NY 10278 geoffrey.dunham@nlrb.gov jacob.frisch@nlrb.gov zachary.herlands@nlrb.gov nicole.lancia@nlrb.gov alejandro.ortiz@nlrb.gov nicholas.rowe@nlrb.gov jamie.rucker@nlrb.gov	

Dated: August 28, 2018

___/s/ Roger K. Crawford_____
Roger K. Crawford
Counsel for California Respondents